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No. 83-935

Office - Supreme Court, U.S.
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In the Supreme Court of the United States
OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN CLYDE ABEL

**ON WRIT OF CERTIORARI TO THE UNITED STATES
 COURT OF APPEALS FOR THE NINTH CIRCUIT**

JOINT APPENDIX

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**PETITION FOR WRIT OF CERTIORARI FILED
 DECEMBER 6, 1983
 CERTIORARI GRANTED MARCH 19, 1984**

52 pp

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUITUNITED STATES *v.* JOHN CLYDE ABELNO. 81-1666
CR 81-880-MMLCHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES

09/08/81 Defendant arrested (Dkt'd 09/11/81).

09/10/81 Filed magistrate complaint (MAGISTRATE REICHMANN) (Doc: 1) (Dkt'd 09/11/81).
Defendant's first appearance (Dkt'd 09/11/81).
Arraignment on magistrate complaint held (DFT ARRN & COMM CUST OF UMS. APPOINTED PD Y. GOMEZ AS CNSL FOR DFT) (MAGISTRATE REICHMANN) (Dkt'd 09/11/81).
Order surety/cash bail set in the amount of \$50,000.00 (W/10% DEP, W/FULL JUSTIFICATION) (MAGISTRATE REICHMANN) (Dkt'd 09/11/81).

09/21/81 Preliminary examination set for 09/21/81 @ 4:30 PM (P/I ARRN SET FOR 9/28/81 @ 8:30AM) (MAGISTRATE REICHMANN) (Dkt'd 09/11/81).

09/21/81 Filed indictment (MAGISTRATE GEFFEN) (Doc: 2) (Dkt'd 09/22/81).
Order surety/cash bail set in the amount of \$50,000.00 (W/10% DEP, FULLY SECURED, W/INT PSA) (MAGISTRATE GEFFEN) (Dkt'd 09/22/81).
—FLD CR72 BY AUSA KENDALL (Doc: 3) (Dkt'd 09/22/81).

09/28/81 Arraignment held (Count 1) (DFT ARRN, STATES T/N AS CHGD) (MAGISTRATE KRONENBERG) (Doc: 6) (Dkt'd 10/01/81).
Order appointing attorney GOMEZ, YOLANDA to represent defendant (FLD

CJA FRM 23) (MAGISTRATE KRONENBERG) (Doc: 6) (Dkt'd 10/01/81). Defendant appears with counsel (MAGISTRATE KRONENBERG) (Doc: 6) (Dkt'd 10/01/81). Arraignment held (Count 1) (DFT ARRN & ENT PLEA) (JUDGE LUCAS) (Doc: 7) (Dkt'd 10/01/81). Defendant enters plea of not guilty (Count 1) (Doc: 7) (Dkt'd 10/01/81) Trial date set for 10/20/81 (Count 1) (JUDGE LUCAS) (Doc: 7) (Dkt'd 10/01/81).

10/01/81 DEMAND FOR NOTICE ON ALIBI.

10/09/81 Motion to suppress evidence filed (MOT#1) (Count 1) (FLD DFT NOTC & MOT/SUPPRESS UNLAWFULLY SEIZED EVID, P/A DECL OF YOLANDA BARRERA GOMEZ & JOHN CLYDE ABEL. RETRNBL 10-19-81 2PM) (Doc: 10) (Dkt'd 10/13/81). Motion to suppress evidence hearing set for 10/19/81 (MOT#1) (Doc: 10) (Dkt'd 10/13/81).

10/13/81 —FLD DFT NOTC OF ALIBI (Doc: 12) (Dkt'd 10/14/81). —FLD DFT X-PARTE APPLIC FOR ORD SHORTENING TIME (HRG SET 10-19-81 2PM) (Doc: 13) (Dkt'd 10/15/81).

10/14/81 Filed trial memorandum (Count 1) (FLD GVT TRL MEMO) (Doc: 14) (Dkt'd 10/15/81). —FLD GVT DISCLOSURE OF WITNS INFO, FRCrP 12.1(b) (Doc: 15) (Dkt'd 10/15/81).

10/15/81 Defendant Ehle pleads guilty.

10/15/81 Answer to motion to suppress evidence (MOT#1) (FLD GVT RESP TO DFT MOT/SUPPRESS EYEWIT IDENTIFICATION. RETRNBL 10-19-81 2PM) (Doc: 16) (Dkt'd 10/15/81).

Filed memorandum in opposition to motion to suppress evidence (MOT#1) (FLD GVT OPP TO DFT MOT/SUPPRESS EVID. RETRNBL 10-19-81 2PM) (Doc: 17) (Dkt'd 10/15/81). —FLD DFT PROP VOIR DIRE QUESTIONS (Doc: 19) (Dkt'd 10/16/81). Filed government's proposed jury instructions (Count 1) (Doc: 20) (Dkt'd 10/16/81). Order filed (FLD ORDER THAT MOTION TO SUPPRESS THE I/D OF DFT BE SHORTENED AND BE HEARD 10/19/81 @ 2:00PM) (JUDGE LUCAS) (Doc: 22) (Dkt'd 10/19/81). Motion to suppress evidence filed (MOT#2) (Count 1) (FLD DFT'S MOTION TO SUPPRESS PRE-TRIAL AND IN-CRT WITNESS I/D OF DFT) (Doc: 21) (Dkt'd 10/19/81). Filed defendant's proposed jury instructions (Count 1) (Doc: 24) (Dkt'd 10/19/81). —FLD DFT'S EX PARTE APP FOR ORDER CONTINUING TRIAL DATE, MEMO P/A, DECLARATION OF CNSL. GAVE ORDER TO CRD (Doc: 25) (Dkt'd 10/19/81). Filed government's proposed jury instructions (Count 1) (Doc: 26) (Dkt'd 10/20/81). Motion to suppress evidence hearing held (MOT#1) (RE DFT'S MOTIONS TO SUPPRESS EVIDENCE AND FOR CONT. MOTIONS TO SUPPRESS ARE PRESENTED TO THE CRT. GOVT'S WITNESS MELINDA LYERLA IS CALLED, SWORN TESTIFIED. GOVT'S EXHIBIT 16, A PHOTO SPEAD, IS MARKED AND RECV'D AS EVIDENCE. DFT MOVES FOR A WITHDRAWAL OF EXHIBIT 16 SO THAT THE EXHIBIT MAY BE USED AT THE TRIAL. THERE IS NO OBJECTION FROM THE DFT AND THE CRT

ORD THAT EXHIBIT 16 BE RETURNED TO THE GOVT (JUDGE LUCAS) (Doc: 27) (Dkt'd 10/20/81).
 Motion to suppress evidence denied (MOT#1) (JUDGE LUCAS) (Doc: 27) (Dkt'd 10/20/81).
 Motion to suppress evidence denied (MOT#2) (JUDGE LUCAS) (Doc: 27) (Dkt'd 10/20/81).
 Status hearings held (RE: HRG PRELIM PROB REVOC. CRT FINDS DFT IS NOT IN VIOL OF HIS PROB AS PROB HAS NOT YET COMMENCED. CRT ORD PETITION DENIED AND FURTHER ORD DFT'S PROB PERIOD TO COMMENCE ON THIS DATE. CRT ORD PROB OFFICER TO REPORT EVERY 60 DAYS FOR THE FIRST YEAR OF DFT'S PROB AND THEREAFTER AS DIRECTED BY THE CRT) (JUDGE BYRNE) (Doc: 40) (Dkt'd 10/20/81).
 10/20/81 Order writ of habeas corpus ad testificandum to issue returnable 10/20/81 @ 9:30 AM (FOR WITNESS ROBERT MILLS, DETAINED IN FCI, TERMINAL ISLAND) (JUDGE LUCAS) (Doc: 41) (Dkt'd 10/20/81).
 Issued writ of habeas corpus ad testificandum (Dkt'd 10/20/81).
 Voir dire begins-jury (Count 1) (JURY IMPANELED) (JUDGE LUCAS) (Doc: 43) (Dkt'd 10/21/81).
 Trial begins-jury (Count 1) (JUDGE LUCAS) (Doc: 43) (Dkt'd 10/21/81).
 Trial held-jury (Count 1) (J/T 1ST DAY. JURY IMPANELLED) (JUDGE LUCAS) (Doc: 4) (Dkt'd 10/21/81).
 Jry trial continued to 10/21/81 @ 9:30 AM (FOR 2ND DAY OF J/T) (JUDGE LUCAS) (Doc: 43) (Dkt'd 10/21/81).
 10/20/81 Defendant Gremard pleads guilty.

10/21/81 Trial held-jury (Cont 1) (J/T 2ND DAY. SWORE WITNESSES & MRKD EXHIBITS) (JUDGE LUCAS) (Doc: 44) (Dkt'd 10/27/81).
 Jury trial continued to 10/22/81 @ 9:30 AM (FOR 3RD DAY OF J/T) (JUDGE LUCAS) (Doc: 44) (Dkt'd 10/27/81).
 10/22/81 Trial held-jury (Count 1) (J/T 3RD DAY. CRT APPOINTS PANEL ATTY EDWIN SAUL TO PRESENT DEFENSE WIT VITO SPILLONE. O/S PRES OF JURY-CRT AND CNSL CONFER RE JURY INSTRUCTIONS) (JUDGE LUCAS) (Doc: 45) (Dkt'd 10/27/81).
 Jury trial continued to 10/23/81 @ 9:00 AM (FOR 4TH DAY OF J/T) (JUDGE LUCAS) (Doc: 45) (Dkt'd 10/27/81).
 10/23/81 —FLD LIST OF EXHIBITS AND WITNESSES (Doc: 46) (Dkt'd 10/27/81).
 Trial held-jury (Count 1) (J/T 4TH DAY. JURY RETURN W/VERDICT. JUDGE WATERS PRESIDING FOR JUDGE LUCAS) (JUDGE LUCAS) (Doc: 46) (Dkt'd 10/27/81).
 Trial ends-jury (Count 1) (JUDGE LUCAS) (Doc: 46) (Dkt'd 10/27/81).
 Jury verdict of guilty (Count 1) (JUDGE LUCAS) (Doc: 46) (Dkt'd 10/27/81).
 Order cause referred to the probation department for a presentence investigation (Count 1) (JUDGE LUCAS) (Doc: 46) (Dkt'd 10/27/81).
 Sentencing set for 11/16/81 @ 2:00 PM (Count 1) (JUDGE LUCAS) (Doc: 46) (Dkt'd 10/27/81).
 —FLD JURY NOTE #1 (Doc: 47) (Dkt'd 10/27/81).
 —FLD VERDICT LIST (Doc: 48) (Dkt'd 10/27/81).

11/16/81 Sentencing of defendant (Count 1) (COMM CUST A/G FOR 25 YRS UNDER 18:4205(A) AND THIS SENT TO RUN CONSEC TO SENT IMPOSED IN E/D OF CALIF) (JUDGE LUCAS) (Dkt'd 11/17/81).
 Issued judgment and commitment to U.S. Marshal (Count 1) (JUDGE LUCAS) (Doc: 50) (Dkt'd 11/17/81).
 Filed notice of appeal (Count 1) (APPL#1) (FLD DFT'S NOTICE OF APPEAL FROM FINAL JUDGMENT ENTERED IN THIS PROCEEDGS ON 11/16/81) (Doc: 51) (Dkt'd 11/17/81).

11/20/81 Filed stipulation between the government and defendant (FLD GOVT'S STIP RE: RETURN OF EXHIBITS) (Doc: 52) (Dkt'd 11/23/81).
 Order filed (FLD ORD RE RETURN OF EXHIBITS STATED ON PLEADING)(JUDGE LUCAS) (Doc: 52) (Dkt'd 11/23/81).

11/23/81 —(APPL#1) (FLD NTC TO APPEAR BF A MAGISTRATE. RETNB 12/2/81 @ 9:05AM BF MAG TASSOPULOS) (Doc: 54) (Dkt'd 11/24/81).

12/02/81 —(APPL#1) (FLD TRNSCRIPT DESIG AND ORD FORM FROM USCA, 9TH CIRCUIT) (Doc: 56) (Dkt'd 12/03/81).
 —(APPL#1) (FLD TRNSCRIPT DESIG AND ORD FORM) (Doc: 57) (Dkt'd 12/03/81).

12/03/81 Filed stipulation between the government and defendant (FLD STIP RE: RETURN OF EXHIBITS, RELEASED TO CUST OF AGENT LYERLA, FBI) (Doc: 58) (Dkt'd 12/03/81).
 Order filed (FLD ORDER RETURNING EXHIBIT 2 TO THE CUST OF AGENT LYERLA, FBI) (JUDGE LUCAS) (Doc: 58) (Dkt'd 12/03/81).

12/17/81 —(APPL#1) (LODGED T/C OF ORD FOR TI SCHEDE RE APPEAL, CRT REPRTERS TRANSCRIPT WILL BE FILD IN DIST CRT 12/30/81, OPEN BRIEF FO [SIC] APPELLANT & APPELANTS DESIGN OF CLERKS RECORD ON APPEAL 2/10/82, APPELLEES DESIGN OF CLERKS RECRD ON APPEAL 2/24/82, BRIEF OF APPELLEE 3/17/82,, REPLY BRIEF OF APPELLANT 3/31/82.) (MAGISTRATE TASSOPULOS) (Doc: 61) (Dkt'd 12/29/81).

03/18/82 —(APPL#1) (FLD ORIG RPT'R'S TRANSCRPT OF PROC HAD ON 10-19-81, 10-20-81 (VOL 1), 10-21-81 (VOL 2), 10-22-81 (VOL 3), 10-23-81 (VOL 4.)) (Dkt'd 03/19/82).

[156] Excerpt of the Trial Transcript, October 21, 1981.

(The following proceedings were had between the Court and counsel in chambers:)

THE COURT: Let the record reflect that in United States versus Abel, we are proceeding in chambers, outside the presence of the jury and the defendant, at the request of defense counsel. * * * *

[158] * * * *

MR. MAC INTYRE: Your Honor, there's one matter I think I should bring up right now. It could be troublesome. Miss Gomez has asked that Mr. Mills be brought over as a witness to testify for Mr. Abel. Mr. Mills is the defendant in a murder case in front of Judge Gray. That's the case that was reversed by the Ninth Circuit. Judge Gray's orders were reversed in regard to dismissal of the indictment. I don't know all the facts of the case.

THE COURT: That was a Lompoc murder case, and it was a question of denial of constitutional rights by being placed in "the hole," allegedly without access to counsel. I know the case, yes.

MR. MAC INTYRE: All right. At some time following Mr. Ehle's arrest on September 10th, he was put [159] in a cell with Mr. Mills. Mr. Ehle and Mr. Mills, and allegedly Mr. Abel, are all members of the Aryan Brotherhood, or Brand. One of the reasons why the bank robbery was committed in this case, allegedly, according to Mr. Ehle's statement, is that Abel and the other parties involved in it were in debt to loan sharking activities in connection with the Aryan Brotherhood. I don't see how it's possible to keep the term "Aryan Brotherhood" or "loan sharking" out of this case if Mr. Mills testifies, because it would really preclude me from an effective cross-examination of Mr. Mills; the reason being that not only will it prevent me from cross-examining as to his—obviously, I don't know what he's going to be testifying to. There's been no proffer of what Mr. Mills' testimony is going to be. I've talked to Mr. Ehle this morning about his conversation with Mr. Mills. I know generally the gist of it from what Mr. Ehle tells me. I

wasn't there. And I don't see how I can keep out the term "Aryan Brotherhood." I want to abide by your Honor's previous ruling, but when I put Mr. Ehle on the stand, he is going—I have asked him not to mention from my questions the term "Aryan Brotherhood," and I just found out this morning the term "Brand" also means "Aryan Brotherhood" in some respect. I don't know what. I don't see how he can testify as to the splitting up of the money [160] without using the term "Aryan Brotherhood." Now, he might be able to, but I don't know what kind of cross examination is going to be asked, and the term might come out then. I don't see how it's going to prejudice the case. It's not a term like "Mafia" in the Polizzi case, which was precluded. I don't see the connotation of the term "Aryan Brotherhood" being something like "Mafia" or a venereal disease or something like that. I don't see—

THE COURT: Well, I do think that it is less pejorative than, say, the "Mexican Mafia" or the plain old "Costa Nostra Mafia," I would agree with you on that.

But let's hear from Miss Gomez. What is your thought?

MISS GOMEZ: Your Honor, I feel that the prosecution should have an opportunity to bring out that the reason that the bank robbery was committed is because they needed money that they owed to someone. If that's what Ehle's testimony is, I see nothing wrong with that coming out.

THE COURT: Well, that it's loan sharking, in essence?

MISS GOMEZ: Well, if they just say that they owed money, people owe money all the time. I think once they say they owed money to a loan shark or they owed [161] money to the Aryan Brotherhood, I don't see why it's necessary to bring that out. Ehle can just say that they owed money and they were in debt and needed money, so they decided to go out and rob a bank to pay off these debts. I don't see why it's necessary to bring out "Aryan Brotherhood" or "loan sharking."

THE COURT: As to Mr. Mills' testimony, is it appropriate to consider an offer of proof as to his testimony, to determine whether or not the Aryan Brotherhood is going to be raised by his testimony?

MISS GOMEZ: That would be acceptable as far as the defense is concerned, your Honor.

THE COURT: All right. Do you want to give that now, so you may have an advance ruling on that?

MISS GOMEZ: Certainly. Mr. Mills' testimony would be that—I don't have my notes in front of me, but my recollection is that he would testify that he was in a cell with Kurt Ehle, and Ehle approached him regarding testifying in this case. Ehle told him that he had agreed to cooperate with the Government because this was his ticket out, that he was going to use Abel as his ticket out of this, because he loved his family and wanted to be with his family, and this is the only way that he could do it. He was afraid that his testimony by itself would not be sufficiently credible, and he wanted [162] Mills to be a witness for the Government as well and also make up stories about Abel, so that this would reinforce his testimony. Mills told him to get lost, and Abel left the cell. And that basically would be Mills' testimony.

THE COURT: What is your view as to whether or not that raises the spectre of the Aryan Brotherhood?

MISS GOMEZ: Your Honor, I don't see how it brings up anything relating to the Aryan Brotherhood. There was no mention of that in their conversations, according to what I have been told.

THE COURT: You've heard Mr. MacIntyre represent, apparently, that Mr. Ehle will suggest that he and Mills and Abel were members of the Aryan Brotherhood. Do you have a position one way or the other on that?

MISS GOMEZ: I've asked my client if he knows people in the Aryan Brotherhood. He's indicated he knows people. He denies being a member. I have not asked Mills anything about the Aryan Brotherhood. I have no reason to believe that any of the three people, Ehle, Abel, or Mills, are members of the Aryan Brotherhood. They have never brought it up to me. I have not spoken to Ehle, of course.

THE COURT: I tried relatively recently a case involving the Mexican Mafia at Lompoc—as you know, I'm sure, as we all know who are involved in this type of case [163]—another prison organization, and in that case there was testimony that the Aryan Brotherhood is a very militant

and ruthless, as it were, prison organization. If Mr. Mills or if Mr. Ehle were members of the Aryan Brotherhood, I can conceive, for example, Mr. Ehle making a determination that he was going to concoct whatever he is concocting. It may be appropriate to inquire whether he is doing so lightly or in view of perhaps the ultimate death sentence that will be levied against him by the Aryan Brotherhood. We had testimony in this Lompoc case or indication in this Lompoc case that the leader of the Aryan Brotherhood is back in Marion, and he gives directions to Aryan Brotherhood hit men, as it were, and they dispatch those who don't follow the dictates of the Aryan Brotherhood. I don't know whether it brings it into the necessity of either direct or cross-examination on the subject. What is your thought?

MR. MAC INTYRE: Well, the only thing I know, your Honor, is what Mr. Ehle told me this morning, and according to Mr. Ehle's testimony this morning—he told me this morning in my office in the presence of an agent that Abel had directed the murder of a person at Lompoc which Mills carried out, and Mills and Abel are very close friends, having served time in prison together, and as part of the bond of that relationship, Mills would [164] probably say anything on behalf of Abel. That's about all I know. I asked Ehle if he had discussed—see, Ehle is in the same cell with Abel. Mills is downstairs in the next tier. And while Ehle is cleaning out downstairs, he runs into Mills, and Mills asks Ehle about the bank robbery, and I think the questions asked were: "When were you arrested? Who else was arrested?," along that line, and "Was bait money recovered on Abel?," and something about a license plate on the Camaro, the reason why they got caught is that somebody forgot to tape the paper over the license plate on the Camaro.

THE COURT: This conversation, again, was between whom?

MR. MAC INTYRE: Between Ehle and Mills. And that's all I know.

THE COURT: Well, give me your thoughts, Miss Gomez. Let's assume for the sake of discussion that there is

a relationship between Mills and Abel such that Mills allegedly has in the past—

Let me go back for a moment, Mr. MacIntyre. Is it your understanding that Mills has admitted to Ehle that he, Mills, at the direction and insistence of Abel, committed whatever he committed?

MR. MAC INTYRE: No. No. He did not admit this to Ehle. Ehle told me that. I don't know how Ehle got [165] that information, whether he got it from Abel, whether he got it from Mills, whether he got it from another party. I don't know. That's what he told me. Ehle told me that, that Abel directed Mills, who's a very young person—I believe Mills is in his early 20's, isn't he?

MISS GOMEZ: I believe so.

MR. MAC INTYRE: —to commit the murder. That's all I know. I don't know where Ehle got that.

THE COURT: Well, if Ehle got it by a process of osmosis, then it's not going to be usable. If he got it either from Mills, or perhaps arguably from Abel, and it turns out that Mills is, in terms of willingness to accept direction, an automaton as far as Abel is concerned and will lie in this case, then we may have to bring this out.

Do you have any thought on that?

MISS GOMEZ: Your Honor, what Mr. MacIntyre has been talking about is all just conjecture of what could have been. I mean, we can make up stories about Ehle may be out to get Abel because Abel doesn't want to have anything to do with the Aryan Brotherhood or is trying to leave the Aryan Brotherhood. I mean, I've heard that rumor, and I've heard it from some of the witnesses that we've interviewed, that, you know, Abel used to belong [166] to the Aryan Brotherhood, but he doesn't any more, he's been trying to get out, and that Ehle is out to get him. I mean, I just don't feel that I should be permitted to cross-examine on something like that when these are just rumors and speculations of people. And that's what we have with Mills, a speculation by agents, by I don't know whoever it is, that Mills was ordered by Abel to kill this person in Lompoc. There's no proof of that. No one's admitting to that. And because of speculations, a fair trial can be jeopardized by

bringing out the mention of "Aryan Brotherhood." No one has admitted to being a member of the Aryan Brotherhood except Ehle, apparently.

MR. MAC INTYRE: Well, maybe not admitted it, but Ehle will testify that Abel is a member of it. He's known Abel since 19—when he was in prison with Abel. He's met him at Tracy ten years ago, when they served time together for—Abel was convicted of bank robbery, got a 20-year sentence, and served time. And they're very close. He served in prison with him. Vito Spillone, who's the alleged alibi witness, also served in prison with Abel until Vito got out of prison. And Ehle will definitely testify that both he and Abel worked as loan collectors for Vito Spillone, which is another area that we might get into if Vito Spillone testifies.

THE COURT: Now, if Vito Spillone testifies—

[171] * * * * *

[THE COURT]: At any rate, let's go back to the Aryan Brotherhood, Brand, et cetera. At the moment, at least, let's have neither side bring up that aspect of it. It may have to come up, depending upon what direction it goes. [172] For example—and I'd like your view on this, Miss Gomez—if Mr. Ehle were to testify—and I'm gathering this from what Mr. MacIntyre is saying—that he, Abel, and Mills were all members of the Aryan Brotherhood together in prison, and that one of the strongest tenets of the Aryan Brotherhood is that they will lie, cheat, steal, and plunder for each other, irrespective of honor, integrity, and an oath to tell the truth, is that going to be admissible, that Mr. Mills is, in Mr. Ehle's—now, this may be as rebuttal for what Mr. Mills says. Ehle comes back and says, "He's a member of the Aryan Brotherhood. So am I. So is Mr. Abel. We took an oath long ago that we would do anything at all to help each other, and it matters not whether we're under oath or anything else." Would that be admissible as rebuttal by the Government? Again I'm trying to point out the potential of doors being opened. But I don't know the facts in this case. I'd like your thoughts on that before we go a lot further.

MISS GOMEZ: I just can't see that, your Honor, as being admissible, because we are getting back again to the Aryan Brotherhood.

THE COURT: Well, I know we're getting back to it, but the question is whether or not it would be relevant to impeach the credibility of Mills.

[173] MISS GOMEZ: I think if we had some kind of evidence other than Ehle saying that everyone is a member of the Aryan Brotherhood, it would be relevant that they have taken such an oath, and that would go to their credibility on the stand.

THE COURT: Again, I don't know whether they have, but I'm suggesting, if there's something of that ilk lurking in the background.

MISS GOMEZ: I could see that as being relevant if, as I mentioned, there was some way of determining whether all three of them were members.

THE COURT: It would require, in your view, a fourth person, who would say, "Ehle—"

MISS GOMEZ: I believe so, yes.

THE COURT: Why wouldn't Ehle be able to say, "In 1973, at Tracy or wherever, Mills and I and Abel agreed to be members of and were members of the Aryan Brotherhood, and one of the tenets of the Aryan Brotherhood is to support your Aryan brother in a time of need"?

MISS GOMEZ: Well, I think that would certainly be relevant, but I think it just—the probative value I think is outweighed by the prejudice in this case. The term "Aryan Brotherhood," as your Honor indicated, I agree, I don't think it's as bad as the term "Mexican Mafia," but I think it comes very close to it, and I [174] think that the jury is very likely to be swayed if they know anything about the Ayran Brotherhood—and I'm sure most of them have at least heard the term, and it's been connected with murders and it's been connected with drugs and it's been connected with other terrible things—and they will convict my client on the basis that he is a member of the Aryan Brotherhood rather than on the evidence.

THE COURT: Well, at any rate, I'm attempting to together peer through the murk in this case and see what

could be involved. At the moment, however, let's not talk about Aryan Brotherhood, the Brand, anything of that nature, until we've had another side-bar conference and one side or the other agrees or disagrees that the doors have been opened. But I do say to you, Mr. Spillone may open up some very unpleasant doors, and I trust that you're prepared for that likelihood. I don't see that there's a great deal of difference between "Aryan Brotherhood" and "loan sharking," quite frankly, but, again, that's a tactical matter for you to consider, and that's why I've turned these tapes over to you.

* * * * *

[348] (The following proceedings were had between the Court and counsel in chambers:)

THE COURT: Let the record reflect we are proceeding in chambers, outside, of course, the presence of the jury and of the defendant. Counsel are present, and in addition present is—

MR. DIAMOND: Charles P. Diamond representing Robert E. Mills, a witness.

MR. MAC INTYRE: Your Honor, in view of our statements in here this morning wth your Honor in regard to Mr. Mills, my information from Mr. Ehle is as follows: [349] Mr. Ehle—

THE COURT: Let me back up just a minute and make a preface. It's my understanding, Mr. Diamond, that the defense in this case, Miss Gomez on behalf of Mr. Abel, is contemplating calling your client as a witness for the defense, and he will testify—do you want to give us a brief offer of proof, at least, as to what his testimony will be.

MISS GOMEZ: Yes, your Honor. Mr. Mills has indicated that he would testify that a couple of weeks ago, while he was in J-1 at Terminal Island, he was visited by Mr. Ehle; that Mr. Ehle mentioned to him that Abel did not have anything to do with the bank robberies, but that he was going to use him as his ticket and would say anything to go free; that the reason that he was doing this was because he wanted to be with his family; and that Mr. Ehle also approached Mr. Mills to support his story as to that it would be more believable with the Government and that this

would help Mr. Mills by him getting less time for the present case that he is incarcerated for.

THE COURT: All right. And for the record, what is Mr. Mills' status in our criminal-justice system, Mr. Diamond?

MR. DIAMOND: Mr. Mills is currently serving [350] a 15-year sentence for bank robbery, as I understand it. He is also under indictment in this district for a homicide that took place at Lompoc in August of 1979. That matter is scheduled to go to trial before Judge Gray on November 24th of this year. In view of the prospect of Mr. Mills' trial, I am paying particular attention to his participation in this case, and although I perhaps do not have technical standing to raise objections to proposed lines of examination or cross-examination, to the extent that the Court will indulge me, I would like to be heard on those matters.

THE COURT: All right. I take it you have advised him of everything that is to his disadvantage in this matter; the obvious: that if he commits perjury, he is subjecting himself to the possibility of a consecutive additional five years to whatever he is doing now, and all the rest of that?

MR. DIAMOND: I have advised him fully of the implications of testifying in this case.

THE COURT: All right. Now, have you completed your offer of proof, Miss Gomez?

MISS GOMEZ: Yes, your Honor.

THE COURT: Mr. MacIntyre.

MR. MAC INTYRE: Well, once again I see the term "Aryan Brotherhood" or "Brand" looming in the [351] background. It's my understanding, after talking with Mr. Ehle again today, that Ehle, Mills, and Abel are all members of the Aryan Brotherhood, and active members, I might speak. It's also my understanding that Abel was the one that directed Mills to kill the individual at Lompoc. It is also my understanding—and I intend to pursue this matter further by talking with Mr. Ehle either when I get up to my office this afternoon or tomorrow morning or tonight—that as part of the allegiance to the Aryan Brotherhood, one is bound to lie or do anything within his power to aid another member, to the extent of committing perjury or giving a false alibi or making false statements in this case.

I've discussed with Mr. Ehle Miss Gomez's statement, what he allegedly said to Mills, and Mr. Ehle did not make any statements that she has reflected to the Court. But I think that the issue and the reason we're back here is how we're going to handle the relationship of Mills, Ehle, and Abel to the Aryan Brotherhood.

THE COURT: I suppose what you're talking about is whether or not the Government should be allowed on rebuttal to recall Mr. Ehle and have him testify in essence as you have indicated.

MR. MAC INTYRE: Right. that's the guts of it.

[352] THE COURT: What is your thought, Miss Gomez?

MISS GOMEZ: Your Honor, I maintain the same position throughout the discussions that we've had here in chambers regarding reference to Aryan Brotherhood. There is no evidence that any of these people are members of the Aryan Brotherhood—

THE COURT: Isn't that the issue, whether or not we are going to admit evidence? Now, if I understand Mr. MacIntyre's offer of proof, there will be evidence, albeit from Mr. Ehle—and that may be a question of how much weight to be given to it—but there will be evidence that Ehle, Mills, and Abel were all members of the Aryan Brotherhood. Now, should we admit that and whatever else follows from that? That's the issue, I believe.

MISS GOMEZ: Your Honor, if Ehle is going to be permitted to say that—Ehle is saying many people are associated with the Aryan Brotherhood. I mean, from my understanding from speaking to Mr. MacIntyre, he has accused me of being associated with the Aryan Brotherhood. Now, I know that that is certainly a fabrication on his part. If he is accusing me of being associated with the Aryan Brotherhood, I don't see how we can trust—

THE COURT: I can assure you we're not going to put that into evidence or allow that into evidence.

[353] MR. MAC INTYRE: I have assured her of that also.

MISS GOMEZ: It seems to me, though, if Ehle is allowed to take the stand and say these people are members of the Aryan Brotherhood, I certainly have a right to get up there

and say, "Haven't you accused other people of being members of the Aryan Brotherhood? Haven't you accused me?"

MR. MAC INTYRE: I don't think we ought to raise this in front of the jury, because it raises collateral matters we need not go into in front of this jury. As long as Miss Gomez brought the matter up, there was a discussion between her and I where I had related to her what an FBI agent related to me. I consider the matter closed and need not go into it.

Going back to what's relevant, I think that Mr. Ehle's testimony is certainly admissible if he so testifies, if Mills testifies, as to any allegiance there is between members of the Aryan Brotherhood—

THE COURT: I think we must go further in whatever offer of proof you have as to the foundation for this conclusion, that—

MR. MAC INTYRE: I can't make an offer of proof, to be quite candid with your Honor, because I have not had the opportunity fully to explore it with him. [354] I will do so this evening, tonight or tomorrow morning. I just haven't had the opportunity to do it.

THE COURT: All right. Presumptively, it would have to be something more viable than Mr. Ehle saying, "I was standing in the exercise yard, and I looked at a cloud, and I saw it written on a cloud."

MR. MAC INTYRE: Right.

THE COURT: We have to have something substantial to get over Miss Gomez's concern. Now, let's assume for the sake of discussion that there is a sufficient foundation submitted by Mr. Ehle, whatever it may be, of the Aryan Brotherhood, and of his knowledge of the tenets of the Aryan Brotherhood, that is, in a robot, automaton-type fashion, to obey the orders of a superior in that brotherhood. I'm not suggesting that's true. I don't know. But assuming we have a sufficient foundation for that, and that Mills is a member, and Abel therefore could give him such direction. Is that admissible or not, in your view?

MISS GOMEZ: Your Honor, I would have to reiterate the same position that I had earlier today, and that is that that type of information would be so prejudicial that my cli-

ent would be convicted for being a member of the Aryan Brotherhood rather than for any type of evidence that was introduced.

[355] THE COURT: Let me ask you this, then, so that there's no question about the hypothetical question I'm putting to you: Accept as true that they are all members of the Aryan Brotherhood and that an order by Abel to Mills will be followed without question, and I guess to make my point clear, Abel has ordered Mills to testify in this case in his defense as you have given the offer of proof. Would that be admissible?

MISS GOMEZ: I think it would be admissible—I think it would be proper for Mr. MacIntyre to ask Mills, "Isn't it true that Abel has ordered you to give this testimony? Isn't it true that you're lying, that you're doing this to help your friend Abel?" But I certainly do not think it's admissible to say, "Isn't it true you're a member of the Aryan Brotherhood and you're here to protect another member?"

THE COURT: I'm not trying to back you to the wall, but I am trying to get your thinking. Keep in mind my hypothetical. We're accepting it as a given, as a true circumstance. We don't have to worry about credibility or anything else. They're all members of the Aryan Brotherhood, and Abel can and did tell Mills, "Get up and lie for me." You can't mention "Aryan Brotherhood"; you can just say that Abel said, "Get up and lie for me," without mentioning this organization of [356] which they're a member?

MISS GOMEZ: That would be my position, your Honor, yes; that if there was somehow that we could prove that they're all members of the Aryan Brotherhood, my position would be that that should not come out, because of the prejudice to my client of being a member of such an organization.

THE COURT: All right. Mr. MacIntyre.

MR. MAC INTYRE: Well, my position would be the opposite. I think that if there is an organization in existence that Mills, Abel, and Ehle are members of which has an allegiance, assuming the proper foundation is laid, whereby Abel could give orders to somebody—and keep in mind—

How old is Mr. Mills?

MR. DIAMOND: 25, I believe.

MR. MAC INTYRE: He's ten years younger than Mr. Abel. I think it's clearly relevant. It definitely [sic] goes to his credibility. And as I say, at this time I probably can't lay the foundation, but I will talk to Ehle.

THE COURT: Mr. Diamond, do you want to be heard?

MR. DIAMOND: I do indeed, your Honor. My concern is not with the Government's rebuttal testimony. [357] That certainly is not a matter that Mr. Mills has any say over.

With respect to cross-examination questions that are directed to Mr. Mills, we have thus far discussed two. One is a possible nexus of Mr. Abel in the homicide which Mr. Mills is accused of. This—

THE COURT: Perhaps we should talk about that, so that counsel can give me an assurance we're not going to be necessarily involved in that. When did that occur?

MR. DIAMOND: Well, as I understand it, to the extent there is any foundation for—

THE COURT: There was a homicide, I take it?

MR. DIAMOND: August 22, 1979.

THE COURT: All right.

MR. DIAMOND: The prison authorities received what is known as a snitch note, a note that was dropped on a counselor's desk by an unknown author, suggesting that Abel was in some undefined fashion behind the murder that was committed. To the best of my recollection, that note did not connect Mr. Mills in with that murder.

The bottom line of what I'm saying is, I don't think there's any sort of good-faith basis which would permit the Government to inquire on cross-examination as to a nexus, and I would have serious reservations about permitting my client to testify or to respond to questions [358] which concern or touch upon matters that he is currently scheduled to be tried on.

THE COURT: He is charged presently with the August 22, 1979, murder at Lompoc; is that correct?

MR. DIAMOND: That is correct.

THE COURT: Are there co-defendants?

MR. DIAMOND: There is one co-defendant.

THE COURT: And who is that?

MR. DIAMOND: An individual by the name of Raymond Richard Pierce.

THE COURT: Is that in any way involved in our litigation?

MISS GOMEZ: No, your Honor.

MR. MAC INTYRE: Not that I know of.

MR. DIAMOND: With respect to the second issue, cross-examination issues concerning my client's membership in the Aryan Brotherhood, I can sympathize with Miss Gomez, but that again is not my primary concern. I have misgivings about such questions being put to Mr. Mills, given the background that Mr. Mac Intyre has laid, and I wonder whether I would not be derelict in advising my client to invoke the Fifth Amendment with respect to such inquiries. It sounds like Mr. MacIntyre is talking about a criminal enterprise, and I think my client would probably be best advised not indicating one [359] way or the other as to any potential affiliation with such an enterprise.

THE COURT: A criminal enterprise? Be more specific.

MR. DIAMOND: It would appear to me that if an organization exists operating under the guidelines as Mr. MacIntyre has outlined them, it is likely that the enterprise is a conspiracy, if to do nothing else, to obstruct justice, if in fact there's a compact between the members or among the members to suborn perjury and to provide perjured testimony. I am very uncomfortable about letting my client testify as to such matters, and again, I think I would be derelict in not suggesting to him that he ought to consider invoking his Fifth Amendment privilege with respect to such inquiries.

Beyond that, I see the general area of examination, [sic] aside from the foundational problems that seem to exist, being somewhat highly inflammatory. And again, I am not trying this case, and my interest is not in the outcome of this case, but in Mr. Mills being dealt fairly with when he is on the stand.

THE COURT: All right. As an offer of proof, Miss Gomez, was there some relationship or has there been some relationship between Mr. Abel and Mr. Mills previous to September the 8th?

[360] MISS GOMEZ: To my knowledge, no, your Honor. Mr. Mills was asked about that, and his response was that he did not know Abel very well and that the reason that he wanted to testify is because he wants to make Ehle's actions known to the Court. He does not want to see a miscarriage of justice. I have asked my client, Abel, whether he knows Mills, and he has indicated to me the same thing: that he knows who he is, but he does not know him very well.

THE COURT: Did they serve time together in some penal institution, to your knowledge?

MISS GOMEZ: I don't know that. I know that Ehle and Mills served time together. I do not know if Mills and Abel ever served time together.

MR. DIAMOND: They were briefly at Lompoc together I believe a year and a half ago, and I don't know the duration of the period of time, but I'm told it was somewhat short.

THE COURT: Has Mills ever been at Marion do you know?

MR. DIAMOND: Mills was transferred to Marion—I have to think back in my chronology. Shortly after Judge Gray initially dismissed the indictment in Mills' case, which was a year ago, July, he was transferred to Marion.

[361] THE COURT: When were they, meaning Abel and Mills, together in a penal institution, as far as you understand, Mr. Diamond?

MR. DIAMOND: I'm speculating and drawing conclusions, but I believe it would have been in '78 or early '79.

THE COURT: Was this what, Lompoc? Is that what we're talking about?

MR. DIAMOND: Yes.

MR. MAC INTYRE: They were also together at TI from the 9th of September to the 11th. Mills was on the floor below Abel and Ehle. Abel and Ehle were in the same cell. Mills was down below.

THE COURT: And how long were they together, if anyone knows, at Lompoc previously?

MR. MAC INTYRE: I do not know.

THE COURT: It seems to me, at the very least, Miss Gomez, we're running the risk of the fact of your client's prior felony convictions coming out before this jury, if a relationship did exist between Mr. Abel and Mr. Mills at some other time in a prison; again, assuming that it's relevant in this whole milieu.

MISS GOMEZ: Right. Your Honor, I feel that it would be fair that they knew each other from before, that this just isn't Mills all of a sudden heard the name [362] "Abel" and decided to come in and testify, but I don't see why it would be necessary to indicate where they knew each other from.

MR. MAC INTYRE: I disagree with that, your Honor.

THE COURT: Well, let's do this: I want to hear more from Mr. MacIntyre tomorrow about his full offer of proof as to the background and knowledge, that type of thing, and then I'll rule on it tomorrow, after I've heard that.

* * * * *

[365] Excerpt of the Trial Transcript, October 22, 1981.

(The following proceedings were had between the Court and counsel in chambers.)

THE COURT: Let the record reflect we are proceeding in chambers, outside the presence of the jury and the defendant in the case of United States versus Abel.

MR. MAC INTYRE: Darrell MacIntyre representing the Government. Also present is Special Agent William Wiechert of the FBI.

THE COURT: Thank you.

Miss Gomez.

MISS GOMEZ: Yolanda Gomez representing John Clyde Abel. * * * * *

[366] * * * * *

MR. MAC INTYRE: I believe the Court's inquiry to me yesterday was in regard to my offer of proof in regard to Ehle's association in the Aryan Brotherhood with Mills and Abel.

THE COURT: Yes.

MR. MAC INTYRE: I spoke to Mr. Ehle this morning from approximately 10 minutes to 9:00 until approximately

10 after in the presence of Agent Wiechert [367] and another agent. He tells me that the motto of the Aryan Brotherhood is "Blood in, Blood out"; that Mills is a member of the Aryan Brotherhood; that Mills has told him that; that Abel was one of the twelve original founders of the Aryan Brotherhood at San Quentin, with an individual by the name of Jack Mahone, who is dead. The code of the Aryan Brotherhood is to first of all deny that such an organization exists and that one is a member of such organization, and also part of the code is to lie and protect fellow members. It takes a year to get in the Aryan Brotherhood, and, according to Ehle, it's a foregone conclusion that both Abel and Mills are members of it. In fact, Ehle served time with Mills from 1979 to '80 in I believe TI, Terminal Island. He has some pictures of himself with Mills taken in the reception room. He read a letter that Mills wrote to Abel talking about where various members on the Aryan Brotherhood were. He said that the term "Brand" is used by the members of the Aryan Brotherhood because when it was first started, they would put a cloverleaf and a "B" on their chest, but when it got widely known that one was a member, they attempted to disguise the tattoos, and he has done so himself, and also so has Abel.

He said that Abel directed Mills to kill someone at Lompoc, and that's what Mills is presently being [368] held on. That basically—just a moment.

(Brief pause.)

In order to get into the Aryan Brotherhood, you have to either kill somebody at the direction of the ones that are in charge of it or be a participant or part of the actual killing to get in the brotherhood. And Ehle estimates that there are approximately a hundred members in the state system of California and approximately three hundred members in the federal system, and that when you are transferred from one institution to another, you contact a member, and he tells you who to get in touch with at the institution which you're going to; that being a member of the Aryan Brotherhood.

I think that's—

THE COURT: Let's talk about Mr. Abel's relationship with Mr. Ehle in the past in terms—

MR. MAC INTYRE: All right. Mr. Abel worked with Mr. Ehle as loan collectors for Vito Spillone.

THE COURT: Well, let's talk about prison relationships first, Aryan Brotherhood-type relationships, if any.

MR. MAC INTYRE: Abel and Ehle?

THE COURT: Yes.

MR. MAC INTYRE: Abel was in the same cell with Ehle out at TI following his arrest, and I believe, [369] if I'm not mistaken, he also was in prison with Abel in the past.

That's correct.

THE COURT: Well, give me a fuller offer of proof as to that. He, Abel, was in prison with Ehle in the past. Where and when?

MR. MAC INTYRE: I don't know the exact dates, your Honor. I think it was in the late—just a moment.

(Brief pause.)

At Lompoc on and off over the last ten years, and definitely for a two- or three-day period of time, Abel was in the same cell with Ehle at TI following the arrest. Prior to that time, they both were incarcerated on various charges on and off for a period of ten years and in communication with each other. And the same way with Mills. He served time with Mills from 1979 to '80.

THE COURT: All right. As part of the offer of proof, you've suggested that Mr. Ehle knows that Mr. Abel directed Mr. Mills to commit a homicide in Lompoc. What is the basis for that?

MR. MAC INTYRE: My understanding is from talking with him that Mr. Abel told him that, told Ehle that.

THE COURT: You've also indicated as part of your offer of proof that in order to become a member of [370] the Aryan Brotherhood, that you have to either kill or be involved as a participant in a killing; is that accurate?

MR. MAC INTYRE: That "Blood in and blood out" is the motto. The only way you get out of it is to get killed and the only way you get into it is either kill somebody yourself or be present when somebody is killed and participate in it.

THE COURT: Well, are we going to be involving Mr. Ehle in a declaration against penal interest?

MR. MAC INTYRE: No, sir. I have not—I'm just telling you what I know. I'm not saying that I'm going to elicit this testimony at trial. I'm responding to the Court's inquiry of the relationship of the Aryan Brotherhood to Mills and to Ehle and to Abel. I did not ask Ehle at any time if he ever, as part of his initiation into the Aryan Brotherhood, killed somebody.

THE COURT: All right. Now, Mr. Ehle, as I understand it, would be testifying that Mr. Abel was one of the twelve founders of the Aryan Brotherhood?

MR. MAC INTYRE: That's what he related to us this morning.

THE COURT: Now, what is the basis of that knowledge?

MR. MAC INTYRE: Pardon me?

[371] THE COURT: What is the basis of Mr. Ehle's knowledge? First of all, as to the fact that Mr. Abel is even a member of the Aryan Brotherhood.

MR. MAC INTYRE: Well, he tells me that Abel told him he was a member of it. Abel told Ehle he was a member of it. And he's just had—I had asked him the question about Abel's and Mills' membership in the Aryan Brotherhood. He said, "Well, that's a foregone conclusion." I said, "Well, would you narrow that down." And he said, "Well, I've had discussions with both of them about their membership in the Aryan Brotherhood, and other members of the Aryan Brotherhood told me that they were members also," and that both Mills and Abel had told Ehle they were members.

* * * * *

[385] There's another matter that might—

THE COURT: All right. Now, let's go back to the Mills-Ehle-Abel triumvirate, if we can, Miss Gomez. You've heard the offer of proof in this case. Do you wish to be heard in that regard?

MISS GOMEZ: Yes, your Honor. Again, assuming that there was some way that this could be proved—and at this point it's Ehle saying that these people have admitted these things to him, and I have questioned those particular individuals regarding their associations with the Aryan Broth-

erhood, and they have denied it. I cannot see what relevancy someone's association in the Aryan Brotherhood would have in a bank-robbery case. And I think there are so many collateral issues in this case, that I think everyone is losing focus of what it is that we're trying. We're trying a case of bank robbery. It seems like we're trying a case of loan sharking, it seems like we're trying a case of extortion, it seems like we're trying a case of who belongs to what association, and I think we're just kind of losing focus on what's going on. If the government were to be permitted to cross-examine Mr. Mills and say, "Isn't it true that you are a member of the Aryan Brotherhood and isn't it true that you have taken an oath," blah-blah-blah, even though Mr. Mills will say, "No, I am not a member," that would be so prejudicial [386] that there's no way—

THE COURT: Well, if that's all there was, you're right, even though the jury would be admonished that a question is not evidence except as it reflects its answer, and they're admonished to disregard the question. If that's all there was, and the Government said, "We don't have any evidence at all which would show he's a member of the Nazi Party or the Aryan Brotherhood or the Mexican Mafia," or some other group that has a negative connotation to it, then of course that wouldn't be allowed, but the Government is representing that they have a witness who will testify that Mr. Mills and Mr. Abel have told that witness that they are both members of this Aryan Brotherhood. So there is some—you may say, "Well, it should be afforded slight weight, if any, because of the benefits that have been afforded this particular witness." But it is not a question of admissibility; is it a question of weight. Let's talk about the relevance of the particular testimony. Mills is going to try as best he can in his testimony—or this is what you would argue, at least. I'm not saying that Mills has the slightest improper motive. I don't know. The jury has to determine that. But if I can again shorthand it, Mills is going to try to impeach, hopefully fatally from your standpoint, the credibility of Ehle as [387] a witness. Now, doesn't that put into issue the credibility of Mr. Mills himself in every facet?

MISS GOMEZ: I think his credibility can be put in issue by way of his felony convictions, any other cross-examination that the Government may wish, but to try to impeach Mr. Mills' credibility by making reference to an organization that the only proof that we have that he belongs to that is that someone is saying that he does, I just feel that—

THE COURT: Well, let me go back. I have some *deja vu* in going back to this, because I believe we discussed it before. But let's assume as far as Mr. Mills—this is a hypothetical—that he was a member of the Aryan Brotherhood, and the Aryan Brotherhood has the tenets that Mr. MacIntyre has asserted in his offer of proof they have. So we're not questioning that as a fact. That is a given. Would that then be relevant?

MISS GOMEZ: I'm sorry. I didn't understand the question, your Honor.

THE COURT: Well, I'm asking you, so that we may hopefully intelligently attack this Evidence code Section 403 issue, whether or not the probative value is exceeded by the prejudicial effect. I'm trying to now start with whether or not it is relevant at all, and I'm asking you to accept for the sake of our theoretical [388] discussion that it is a fact that all three of these men are members of the Aryan Brotherhood and that the Aryan Brotherhood has the tenets and procedures that have been described by Mr. MacIntyre in his offer of proof. Would that be relevant?

MISS GOMEZ: No, your Honor. I think what organization a particular person—well, let me take that back. I think arguably it is relevant because of the representations that have been made in the offer of proof regarding they will lie on the stand.

THE COURT: Well, again—

MISS GOMEZ: Or that inference—

THE COURT: —we're now into the ivory tower, and that's a fact that we're looking at. We're not arguing whether or not it is a fact and that type of thing and the weakness or strength. It is a fact. So accepting it as a fact, would it be relevant?

MISS GOMEZ: I think, your Honor, it would be relevant, but only as far as asking, for example, "Isn't it true that you belong to an organization where you try to protect each other?," or "Isn't it true that you belong to an organization that you would be willing to lie for another member?" I think that's the farthest that something like that should be allowed to get to, but not the mention of "Aryan Brotherhood" or any other [389] organization that has the type of connotations that the Aryan Brotherhood has.

THE COURT: Remember, in my ivory-tower hypothetical, it's a fact that they are members of the Aryan Brotherhood. Given that fact, it shouldn't be mentioned?

MISS GOMEZ: Your Honor, I think, given so, it's too prejudicial to be allowed in a trial.

THE COURT: Do you wish to be heard further?

MISS GOMEZ: No, your Honor.

THE COURT: The Court has carefully, over the last couple of days, as a matter of fact, and last night and this morning, examined its conscience and Evidence Code Section 403 and the necessity of weighing the probative value of the evidence with the prejudicial value to the defendant. There's no question that this evidence is probative, relevant, admissible, as it goes directly to the credibility of Mr. Mills and is at the heart of the credibility of Mr. Mills. Certainly his testimony is a critical area in this case, because it reflects directly upon the Government's "star witness," and the government should be entitled by fair means to assess and attack the credibility of that particular witness.

Based on the offer of proof, which is a [390] substantial offer of proof, with some Spinelli, Aguilar specifics involved, it seems to the Court that the Government should be entitled to attack the credibility of Mr. Mills. I have determined that the probative value of this evidence does outweigh the prejudicial value, and I have made all the tests that I can, that I'm adjured to do by the Ninth Circuit, before I have come to this ruling.

* * * * *

[392] Are you going to be going into that?

MR. MAC INTYRE: No.

THE COURT: All right. Now, your next area of concern?

MR. MAC INTYRE: I will say, I am not going to go into it, but I do not know what questions will be asked on direct examination.

THE COURT: On cross-examination?

MR. MAC INTYRE: Yes. I'm not going to call Mills, and I don't intend to go into the two areas he just mentioned. My sole impeachment of Mills is going to be, one, his prior felony convictions; two, his relationship with Abel, the fact that they—from Abel, what he knows about their relationship, the fact that they're in the Aryan Brotherhood, and the code or creed of the Aryan Brotherhood.

THE COURT: Again, Miss Gomez, it's obvious, if Mr. Mills goes on the stand, that, at the very least, the fact of your client's prior convictions of felonies is going to be revealed. I think that's inherent in bringing Mr. Mills on, because it's going to develop their prior relationship—"their," Mr. Abel's and Mr. Mills'—in prison. I gather that you're aware of what I think is an obvious likelihood at the very least. Do you agree with that?

[413] * * * *

THE COURT: One additional thing that I would like. It seems to the Court appropriate to have a limiting instruction on the testimony of Mr. Mills, and the impeaching testimony of Mr. Mills, as to what it is to be considered for. For example, if there is an Aryan Brotherhood relationship, that's not to be construed as evidence of guilt in this crime at all. It may be considered perhaps as it reflects upon the credibility of Mr. Mills. Now, Miss Gomez, if you feel you're entitled to such a limiting instruction and wish one given. I'm suggesting to you that it is your duty to submit one in writing to the court, so that the Court may consider it in giving it to the jury. It may be, for trial practical reasons, you don't wish one, and I respect that, but I'm simply trying to help you by suggesting that if you deem it appropriate, you should [414] submit such a limiting instruction.

All right. Anything further.

THE COURT: We'll be in recess.

* * * *

[423] at this time.

MISS GOMEZ: Yes, your Honor. We would be prepared to call Robert Mills to the stand.

THE COURT: Very well. Are you prepared to proceed before the jury in that regard?

MISS GOMEZ: This is in front of the jury, your Honor.

THE COURT: All right.

MR. DIAMOND: Your Honor, I've been advised by Mr. Oppenheimer that in my absence, the Court made certain tentative rulings. Just so I understand the ground rules as well as Mr. Oppenheimer, it is my understanding that the Court has indicated that during cross-examination, the Government may be permitted to inquire of Mr. Mills as to membership in the Aryan Brotherhood, and that at that point we will discuss the matter further if an objection were raised.

THE COURT: Yes. And counsel were to come to side bar before any Fifth Amendment privileges were asserted. It is, I've said on the record previously, my understanding from Miss Gomez—and that, of course, is the only knowledge I have on the question—that Mr. Mills' response would be in the negative should he be asked that question. But at any rate, before any Constitutional privileges are asserted, we have agreed—[424] I'm not sure whether you were there or not, but we have agreed that there would be an approach to side bar and a discussion of it, and I have asked counsel for any authorities that they might have which would indicate one way or the other whether or not it's appropriate to assert the privilege before the jury or outside the presence of the jury. At any rate, we'll proceed when that does occur.

MR. DIAMOND: Your Honor, a suggestion occurred to me after we left your chambers, and that was to suggest to the Government that the question be reframed in a manner to inquire in the same area but avoid the difficulty that we're all encountering, and that would be for the question to be asked in the following terms: whether Mr. Mills and Mr. Abel are members of an organization together, without making reference to any particular organization. I think

that would go a substantial way in resolving the problems that we see, and indeed, would allow Mr. MacIntyre the same latitude on cross-examination that he otherwise would have, particularly with respect to the rebuttal witness.

THE COURT: How about that at least as a preliminary understanding, Mr. MacIntyre, that we do not use the name itself of the Aryan Brotherhood, but we speak of it in some other generic fashion or descriptive fashion?

[425] MR. MAC INTYRE: Well, your Honor, I don't like to cross-examine with my hand tied behind my back, but I think that that perhaps, in view of the Court's ruling—and I certainly appreciate Mr. Diamond and the other gentleman's concern—is agreeable with the Government.

THE COURT: All right.

MR. MAC INTYRE: However, if certain matters are gone into—I mean, I'm going to develop the organization on cross-examination in some respects, that there is a bond in the organization and the two criteria for that particular bond, but I will refrain from using the term "Aryan Brotherhood," as suggested by Mr. Diamond.

THE COURT: Thank you.

Is that agreeable with you, Miss Gomez?

MISS GOMEZ: Yes, your Honor.

THE COURT: Let's have an additional understanding, then, before any counsel utilizes that term, that we have a side-bar conference regarding it. Is that agreeable?

MISS GOMEZ: Well, just to be clear on the record, your Honor, it's acceptable that we have the side-bar conference. It is, of course—

THE COURT: You're not waiving any of your prior objections.

[428] DIRECT EXAMINATION

BY MISS GOMEZ:

Q Mr. Mills, do you know John Clyde Abel, who is seated at the counsel table with me in the brown suit?

A Yes, I do.

Q And have you known him for a very long period of time?

A About a year and a half.

Q Do you also know a person named Kurt Ehle?

A Yes, I do.

Q How well do you know Mr. Ehle?

A Very well.

Q For approximately how long a period of time have you known him?

A About two and a half years.

Q Did you have a conversation with Mr. Ehle recently?

A Yes, I did.

Q Could you tell us approximately when that conversation was and where.

A It was approximately maybe three or four weeks ago, and it was in Unit J-1 in Terminal Island.

Q Exactly where were you when you had the conversation with Mr. Ehle?

A I was locked in my cell on the second tier, [429] and he had come down to talk to me.

Q What was the substance of the conversation that you had with Mr. Ehle?

THE COURT: Rather than the substance, to assist the jury, what did he say and what did you say?

BY THE WITNESS:

A He came down about 7:30 at night, and he told me his intention was to implicate John Abel on a bank robbery—

MR. MAC INTYRE: Objection, your Honor. It's not in response to the question, who asked who or what asked what.

THE COURT: Tell us as best you can, Mr. Mills—I appreciate it's impossible to give us the exact words, but if you can start out by saying, "He said," and then give us as best you can his precise words. Do you understand the question, sir?

THE WITNESS: Yes.

THE COURT: Thank you.

BY THE WITNESS:

Q He said—he came down to the cell, and I asked him how he got on the tier. He said he was an orderly. And he was acting kind of nervous, and I asked him what was wrong, and he said that—he told me his [430] plan about

joining a Federal witness program and implicating John Abel in a bank robbery to insure his own freedom.

Q Did he tell you when this bank robbery had occurred?

A He just—I think he mentioned a couple weeks before I talked to him.

Q And did he say whether John Abel was one of the bank robbers?

A He told me that John Abel was not one of the bank robbers.

Q Did he tell you whether he was going to say that he was or was not?

A He told me that he intended to implicate John in a bank robbery because he hadn't been out of prison 60 days and they had him back in jail, and he thought they were going to give him 25 years for the robbery, and he told me that he couldn't do that time, so he intended to implicate John, because John would be his ticket to the streets.

Q And did he tell you how he thought that this would help him get out of prison?

A He told me that he intended to make a deal with the Federal authorities to implicate John, so that they [431] would let him out, you know, with—his exact words to me was that he would be out within a year.

Q Did he tell you why he was telling you this information, why he was giving you this information?

A Well, we were very close friends, like I said, and when we were up at Lompoc, our wives lived together, and we visited every day together. And he said that he was looking out for me, since I was his only friend, real close friend, and what he wanted me to do was join the program with him, and he said that we could strengthen each other's stories, and that we would both be out within a year.

Q So did he ask you to do something?

A He said that he would—I asked him, "Did John rob the bank?" He said, "No, John didn't rob the bank." I told him, "Well, how are you going to be able to prove it?" And he says, "When I walk in the courtroom with Federal marshals all around me, the jury will believe me." You know. He says, "I will be a Government witness." And at that point I told him, "Well, if we get on the stand and say that,

it will be perjury if—because they'll find out that we're lying." And he says, "I'll tell you what to say. Don't worry about it." He goes, "I'm looking out for you because I know you're going to [432] have to be in about ten more years, and if we do this, we'll both be out within a year if we make a deal with the Federal authorities."

Q And what was your response to that?

A I told him that it was wrong. I told him that he's trading in a guy's life to go to prison for something he didn't do, so that Ehle could go to the streets.

Q Mr. Mills, has anyone asked you to testify here today?

A No.

Q Why are you testifying here today?

A Because—well, I laid and thought about it, ma'am, and, you know, I don't usually get involved in people's affairs in prison, but there's a guy getting ready to go to prison that didn't do anything wrong—he wasn't involved in this—for a guy that wanted his freedom.

Q Now, you made reference to you being in prison before. Have you ever been convicted of a felony in the past in your adult life?

A I've only been convicted once in my adult life, when I was 18. I've been in prison since 1975.

Q What were you convicted of?

A A robbery.

[433] MISS GOMEZ: I have no further questions at this time.

THE COURT: Thank you.

For the jury's information, Mr. Mills does have counsel, who are present.

Gentlemen, if you would simply identify yourselves, please.

MR. DIAMOND: Charles Diamond.

MR. OPPENHEIMER: Randy Oppenheimer.

THE COURT: Thank you.

CROSS-EXAMINATION

BY MR. MAC INTYRE:

Q Mr. Mills, you're 24 years old, aren't you?

A 25.

Q When were you 25?

A In March.

Q What was the felony conviction you are in prison for?

A A robbery.

Q And when did that occur?

A In 1975.

Q All right. You refused to talk to the Government prior to testifying today, didn't you?

A Yes, I did.

[434] Q Now, you say you're a real close friend of Mr. Abel?

A No. I'm—I wouldn't say a real close friend. We were acquaintances. We were friends. I knew him; he knew me.

Q How did you know him?

A Well, when he was on—I'll refer to the main line as "population"—I was in the hole for about nineteen months. I came to the visiting room every day, and I would see John out there, and periodically got to know him over that nineteen months.

Q Where was this main line?

A That's the population of the prison.

Q What prison?

A Lompoc.

Q All right. Do you and John, Mr. Abel, belong to any organization together?

A No, I don't.

MISS GOMEZ: Objection, your Honor.

THE COURT: Overruled.

BY MR. MAC INTYRE:

Q You do not belong to any organization together?

A No, I don't.

Q Now, in this conversation, what date did this [435] conversation take place with Mr. Ehle?

A As—for the specific date, it was the day before—Ehle had disappeared the next day. I had come down to court. So did John and Mr. Ehle. We all come down here together in the Federal Building. I think they got arraigned that day. I'm not positive of the date. But one of the attorneys could probably give it to you.

Q Now, at the time Mr. Ehle talked to you, you were on the second tier below him?

A That's right.

Q And he was in the same cell with Mr. Abel?

A I'm not sure about that. I know he lived on the third tier.

Q Isn't it a fact that when Mr. Ehle came down to see you, that you asked him, "Did John have any bait money on him?"

A I never said that. That's not true.

Q You never made any statement to him about bait money?

A No, sir.

Q You're as sure of that testimony as you are of your testimony today?

A I'm very sure of it.

Q Did you ask him anything about the kid?

[436] A What kid is that?

Q Do you know Ron Gremard?

A Oh, that—that youngster, [sic] I just met him this morning, when we were coming over here together.

Q Did you ask Mr. Ehle what happened to the kid, use the word "kid"?

A I didn't even know him then. I just met him this morning.

Q You are referring to him as a youngster?

A He's about my age.

Q Now, isn't it a fact that in that conversation, you tried to get Mr. Ehle's home phone number?

A When I first came to Terminal Island, like I say, we were close friends. I had his wife, Kathy, I had her phone number recently—or previous to that, but when I got to Terminal Island, you know, I wanted to contact him. He was my friend. He was on the streets. I tried to get his phone number from a couple of the people there, but he had said that he didn't want anybody calling his house, so he didn't give me his number.

MR. MAC INTYRE: Your Honor, could we approach the bench?

THE COURT: Yes.

(The following proceedings were had between [437] the Court and counsel at side bar, outside the hearing of the jury:)

MR. MAC INTYRE: Your Honor, I intend to ask him if he's a member of the Aryan Brotherhood and I'm going to ask him if Mr. Abel is a member of the Aryan Brotherhood, if Mr. Ehle is a member of the Aryan Brotherhood, and is it not a fact that the Aryan Brotherhood has a creed that individuals will lie to protect other individuals, and that they, as part of their bond in the Aryan Brotherhood, will deny any membership or association with it. And I think it goes to his credibility, it goes to his bias and prejudice in this case.

MISS GOMEZ: Your Honor, I would pose the same objections that I've been posing in chambers, and that is that the U. S. Attorney may perhaps get into whether they belong to any organization, which he already has, but to go any further and actually make reference to the Aryan Brotherhood or make reference to any kind of motto, that that would just be prejudicial, and that's like ending the case at this point; that my client will be denied of a any type of a fair trial because of the prejudicial effect of such type of questioning.

MR. OPPENHEIMER: Your Honor, there doesn't [438] seem to be any independent purpose served by reference to the name of the organization whatsoever as far as we can tell; that some of those same questions could not be pursued on the basis of reference to an organization, as we discussed prior to the jury being called back, and I continue to be unpersuaded that there is an independent reason to go beyond that, to the extremely prejudicial connotation of the term, as we've discussed in chambers and as we discussed at the beginning of the hearing.

THE COURT: I wonder, Mr. MacIntyre, if you can proceed with asking him about membership in a prison organization or has he heard of such an organization which has various tenets, without using the name itself?

MR. MAC INTYRE: All right.

THE COURT: If he denies right down the line, I don't think you need to bring up the name "Aryan Brotherhood."

MR. MAC INTYRE: I can explore the area by using "a prison organization which has as part of its creed to lie to protect its own."

THE COURT: Yes. I think you should indicate, so that the jury isn't confused—I gather this is correct—that it is a secret organization, as opposed to—
[439] MR. MAC INTYRE: Oh, yes.

THE COURT: I'm sure there are numerous organizations that are—

MR. MAC INTYRE: Well, I wanted to get the Court's preliminary ruling, and then I would proceed on that.

THE COURT: There are numerous organizations that the correctional institutions sponsor. I think you have to make it clear, if we're not using the name, that it's a secret organization.

MR. MAC INTYRE: I will.

THE COURT: All right. Let's proceed.

(Whereupon, proceedings were resumed in open court, within the hearing of the jury.)

BY MR. MAC INTYRE:

Q Mr. Mills, do you belong to any secret type of prison organization which is restrictive somewhat in its membership?

A No, I don't.

Q Do you belong to any secret-type organization which has as part of its creed or tenets or oath of that organization that the members thereof will first of all deny they belong to that secret organization?

A No, I don't.

[440] MISS GOMEZ: Your Honor, excuse me. For the record, I will continue to object during this line of questioning.

THE COURT: Very well. The objection is overruled.

You may proceed.

BY MR. MAC INTYRE:

Q And do you belong to any secret organization which has as part of its creed that those members who belong to it will lie to protect the members that are in that secret organization, prison organization?

A I know of no organization like that.

MR. MAC INTYRE: No further questions.

THE COURT: Thank you.

MISS GOMEZ: No further questions, your Honor.

THE COURT: Thank you, sir. You may step down.

MR. DIAMOND: Your Honor, may we be excused?

THE COURT: Yes, you are excused. * * * *

[499]* * * * *

KURT E. EHLE,

called as a witness in rebuttal by the plaintiff, being first duly sworn, was examined and testified as follows:

THE CLERK: State your full true name and spell your last name for the record.

THE WITNESS: Kurt Edward Ehle, E-h-l-e.

DIRECT EXAMINATION

BY MR. MAC INTYRE:

Q Mr. Ehle, do you know a gentleman by the name of Robert Mills?

A Yes, I do.

Q How long have you known Mr. Mills?

[500] A Approximately three years.

Q Were you ever in the penitentiary with him at any time?

A Yes, I was. I was in Lompoc with him in '79 and '80.

Q Directing your attention to approximately September 9th or 10th of this year, were you out at Lompoc Prison, being confined there? I mean—excuse me—at TI.

A No, I wasn't.

Q Were you at Lompoc?

A No, I wasn't.

Q Were you at someplace of confinement where Mr. Mills was at?

A Not on September 9th or 10th, no.

Q How about soon thereafter?

A It was somewhere around the 20th that I was out at TI with him, Terminal Island.

Q When you were out at TI, were you in the same cell with Mr. Abel?

A Yes, I was.

Q And during the time you were there, directing your attention to that day, approximately, did you have occasion to go down on the lower tier, where Mr. Mills' [501] cell was?

A Yes, I did.

Q And did you engage in a brief conversation with him?

A Yes, I did.

Q How long would you say the conversation lasted?

A Approximately ten minutes.

Q What, if anything, was said to you by Mr. Mills or what, if anything, did you state to him?

A Well, initially, the conversation had to do with the fact that he was a little upset at me for not allowing him to have my phone number while he was in custody and I was on the streets, and there—

Q Excuse me a minute. Prior to talking to Mr. Mills or having that conversation, had you met with the FBI agents and given them the version and told them of what had happened in regard to the events of that bank robbery?

A Yes, I had.

Q Was there any attempt in your mind to conceal this fact from Mr. Mills?

A Yes, there was.

Q And did that have anything to do with the fact that Mr. Mills was a member of any secret prison [502] organization?

A Oh, certainly.

Q Is Mr. Mills a member of such a prison organization?

MISS GOMEZ: Objection, [sic] your Honor. Same grounds as before.

THE COURT: Overruled.

You may answer.

BY THE WITNESS:

A Yes. Yes, he is.

Q And do you know whether or not Mr. Abel is a member of such an organization, the same secret prison organization?

MISS GOMEZ: Objection, your Honor.

THE COURT: Overruled.

You may answer.

BY MR. MAC INTYRE:

Q Would you answer the question.

A Yes, I do, and yes, he is.

Q So that prior to having your conversation on this date with Mr. Mills, you had already been interviewed by the FBI and had told them the facts of which you previously testified involving this instant bank robbery on September 8th?

[503] A Yes, I had.

Q Now, after Mr. Mills asked you for your home—was it for your home telephone number?

A Yes.

Q Is that the number where your wife and children resided?

A Yes, it was.

Q And what, if anything, else did he state to you?

A Towards the latter part of the conversation, this case or this robbery was touched upon lightly. He asked me—the first thing he asked me—I remember it clearly—he says, "Is it true that John had bait money in his pocket from the bank robbery?" And I believe my reply to that was: "Yes, I believe he did." The next thing he asked me was in regards to Gremard's not covering the license plate. And the last thing I think that he asked me was how good of a case the FBI had or something like that, and I told him that, you know, especially in regards to myself, pretty good.

Q This secret prison organization which you have testified that Abel and Mills were members of, how do you know that Mr. Abel is a member of such an organization, secret prison organization?

A Well, first and foremost, I've known Mr. Abel [504] for a good many years, and I have been told by him and others that he is a ranking member in this organization.

Q And how about Mr. Mills' relationship to this secret prison organization; how do you know that Mr. Mills is a member of such an organization?

A Not only having been told by other people, him as well, I also read a letter or a kite that was directed to Mr. Abel confirming that he was a member of this organization.

Q Now, does this organization have any type of creed whereby those that are members of the organization in the prison system must abide by?

A Yes, it does.

Q Just basically, what is the creed in regard to letting others know you're a member of the organization or in testifying on behalf or against another member?

A Well, firstly, it's supposed to be denied that there is such an organization at all costs for protection, for protection of the organization, and secondly, you know, you are to do anything you can, you know, lie, cheat, steal, kill, anything you can, to protect another member of the organization.

Q And what, if any, measures by this secret prison organization are used if one does not abide by the [505] code within the prison system?

MISS GOMEZ: Objection, your Honor, under 608 and 403.

THE COURT: The objection is sustained.

BY MR. MAC INTYRE:

Q Now, you have known Abel for how long?

A Back in the late '50's or early '60's.

Q Did you become aware of his association in this secret prison organization from being in prison with him?

A Yes.

Q Now, during this conversation with Mr. Mills, did he use the words asking you about a younger person with you or a kid, or words of that nature?

A I don't understand it. Would you repeat the question?

Q The question perhaps is confusing. Was the name "Gremard" used in this conversation at all?

A Oh, yes. Yes. Yes, it was.

Q And what reference and by whom was the name "Gremard" used?

A It was used by Mills in regards to his lack of expertise in covering the license plate on the escape vehicle.

[506] Q During the robbery, are you aware of any attempt to cover the license plate on the Camaro?

A Yes, I am.

Q What, if anything, are you aware of?

A I'm aware that a book was supposed to have been placed over the license plate, thereby covering the number, and it apparently didn't happen. It wasn't—I didn't see it done and I didn't see it not done.

Q Did you tell Mr. Mills at any time—first of all, how long did this conversation last, approximately?

A Between Mills and myself?

Q Yes.

A Approximately ten minutes.

Q Did you at any time tell him that Abel did not have anything to do with the bank robbery of September 8, 1981?

A No, I didn't.

Q Did you at any time tell him that the only reason you were testifying is to protect your family?

A No, I didn't.

Q Did you at any time tell him that you were fabricating or making up a story about Abel's participation in the robbery of September 8th to save yourself?

A In view of the fact of how close Abel and Mills [507] were, it would be suicide for me to say any of those things to him.

Q Why do you say that it would have been suicide?

A The penalty for that's death.

MISS GOMEZ: Objection, your Honor.

THE COURT: The objection is sustained.

BY MR. MAC INTYRE:

Q Is your fear of harm to you from the secret prison—

MISS GOMEZ: Objection. Assumes facts not in evidence.

THE COURT: Sustained.

BY MR. MAC INTYRE:

Q You're a member of this secret prison group also, are you not?

A I'm directly connected, yes.

MR. MAC INTYRE: Just one moment, your Honor.

(Brief pause.)

No further questions at this time.

THE COURT: Thank you.

You may examine, Miss Gomez.

[508]

CROSS-EXAMINATION

BY MISS GOMEZ:

Q Mr. Ehle, you were arrested on September the 10th, isn't that correct, on this particular case?

A Yes, that's correct.

Q And when you were arrested, you were interviewed by several agents; isn't that correct?

A That's correct.

Q Approximately how many agents did you speak to about this case?

A Are you speaking about the day of my arrest?

Q The day of your arrest and following up to the 15th, when you entered into the plea agreement.

A I have no idea. There were four or five agents present.

Q And they told you how much time you were going to do on this case; isn't that right?

A I don't believe they ever mentioned exactly how much time was involved in this. I knew. They asked me, and I knew.

Q But they told you it was substantial time; isn't that correct?

A Oh, indeed—

MR. MAC INTYRE: Your Honor, object to counsel arguing with the witness. The witness answered that the [509] agents did not tell him how much time he would do.

THE COURT: Sustained.

BY MISS GOMEZ:

Q And you had just been out of prison for two months, isn't that correct, when you were arrested?

A No. I had been out of prison for five months.

Q And you're tired of being in prison, aren't you?

MR. MAC INTYRE: Objection, your Honor. That's speculative and argumentative.

THE COURT: Overruled.

You may answer.

BY THE WITNESS:

A Yes, I am.

Q You want to spend more time with your family, don't you?

A I believe that would be a logical assumption, yes.

Q You love your family very much, don't you?

A Indeed.

Q Now, you stated that you are a member of this secret prison organization; is that not true?

A I said I was directly connected, yes.

Q I'm sorry. I couldn't hear you.

A I said I was directly connected with them, yes.

[510] Q So you are also supposed to deny that there is such a secret organization; is that correct?

A At that point in time, if you're speaking of the arrest, yes, it was obligatory for me to deny it.

Q And you also are supposed to lie, cheat, and steal, you said; is that correct?

A At that time I was, yes.

Q You say, "at that time." You're talking of the day that you were arrested?

A Yes.

Q But you're no longer a member of that organization, so you don't have to follow that; is that correct?

A That is correct.

Q Now, when you spoke to Robert Mills, you had already entered into a plea agreement with the Government; isn't that true?

A Yes.

Q And you were afraid that the Government might not believe everything that you had to say; isn't that correct?

A Could you repeat that question?

Q Yes. And you were afraid that the Government might not believe everything that you had to say about the [511] bank robbery; isn't that correct?

A I had no doubts about their believing anything I had to say, no.

Q Mr. Ehle, isn't it true that you approached Mr. Mills so that he would corroborate your story?

A No.

Q You indicated you received a letter from someone,

and that person was saying that Mr. Abel was a member of this secret organization. Do you have that letter?

MR. MAC INTYRE: Your Honor, I believe the question misstates the evidence. The witness testified he read a letter that Abel was mailing to Mr. Mills.

THE COURT: Perhaps you can lay the foundation. And I'm not sure that your question as posed does represent the facts in his previous testimony.

BY MISS GOMEZ:

Q Mr. Ehle, you testified to something regarding a letter that you had seen. Who was the letter from?

A Mills.

Q And who was it being sent to?

A Abel.

Q And Mills gave it to you to read?

A No. Abel and I were in the same cell. There [512] were two letters sent. One was to me; one was to Abel. They were both in the same envelope. We both read—he read the letter—Abel read the letter to me and I read the letter to him.

Q So you don't have that letter?

A Of course not. No.

Q Who was the person that was told to put a book on the license plate?

A Gremard.

Q Who told him to do that?

A Abel.

Q Mr. Ehle, isn't it true that you are considered to be in charge of intelligence on banks?

A Yes, I guess you could say that in regards to this situation.

Q And at the time that Mr. Gremard was told to put a hood over the license plate, you were going to go and rob a bank; isn't that correct?

A That's correct.

MISS GOMEZ: I have no further questions, your Honor.

THE COURT: Thank you.

[513] REDIRECT EXAMINATION

BY MR. MAC INTYRE:

Q Mr. Ehle, at the time that you committed the robbery, as you testified, with Mr. Abel and Mr. Gremard, were either you, Mr. Gremard, or Mr. Abel in debt of money to this secret prison organization that you wanted to pay back?

MISS GOMEZ: Objection. Relevancy.

THE COURT: I believe it's outside the scope of—

MR. MAC INTYRE: Your Honor, I think counsel—may we approach the side bar? I don't want to—

THE COURT: Yes.

(The following proceedings were had between the Court and counsel at side bar, outside the hearing of the jury:)

MR. MAC INTYRE: Your Honor, I think counsel opened up this subject on cross-examination by asking isn't it a fact that Ehle was in charge of the intelligence for the banks, and I think the Government has the right to pursue that with what Abel was in charge of. Abel was I believe in charge of robbing jewelry stores, and they couldn't find a jewelry store to rob, so they concentrated on the bank. And the reason they were committing the robbery was that all of these people were in debt to this [514] secret prison organization, i.e., which we haven't mentioned, and I think I ought to be able to have the right, with the Court's discretion, to go into this a little bit.

THE COURT: Miss Gomez.

MISS GOMEZ: Your Honor, I don't see the relevancy of how robbing jewelry stores is related to robbing the bank and of what relevancy it would be to inquire into money that is owed at this particular juncture of the case.

THE COURT: There's an old Biblical admonition: Sufficient unto the day is the evil thereof. I'm going to sustain the objection under Evidence Code Section 403.

Let's proceed.

(Whereupon, proceedings were resumed in open court, within the hearing of the jury.)

BY MR. MAC INTYRE:

Q When you say the letter was destroyed, what do you

mean by that? Is there a reason why it was destroyed?

A The letter from Mills to Abel? Yes. Those are pretty damning evidence in the hands of the authorities or the prison guards or whatever.

Q Did that letter outline the activities of other members of this secret prison organization that you and [515] Abel and Mills were members of?

A To a slight degree, yes.

MR. MAC INTYRE: No further questions.

THE COURT: Anything further?

MISS GOMEZ: No further questions, your Honor.

THE COURT: Thank you. You may step down, sir.

MR. MAC INTYRE: Mr. Alba of the FBI. May witness be excused, your Honor?

THE COURT: Any objection?

MISS GOMEZ: No objection, your Honor.

THE COURT: You are excused, sir.

* * * *

Supreme Court of the United States

No. 83-935

UNITED STATES, PETITIONER

v.

JOHN CLYDE ABEL

ORDER ALLOWING CERTIORARI. Filed March 19, 1981.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.